



01 failed to exhaust his administrative remedies. Dkt. No. 4. For the reasons set forth below,  
02 the Court recommends that the Commissioner's motion to dismiss be DENIED and that the  
03 Commissioner file its answer and the record in sixty days unless, during that time, the Appeals  
04 Council rules on plaintiff's exceptions.

## 05 II. FACTS AND PROCEDURAL HISTORY

06 Plaintiff applied for Title II disability benefits on January 11, 2002, for a back injury  
07 he claims was sustained on December 31, 1996. On June 10, 2003, the ALJ denied the  
08 plaintiff's application, apparently because plaintiff failed to provide sufficient evidence  
09 showing that the injury occurred while he was insured. The Appeals Council later denied  
10 plaintiff's request for review, at which point the ALJ's decision became the "final decision" of  
11 the Commissioner, as that term is defined by 42 U.S.C. § 405(g). On October 24, 2003,  
12 plaintiff filed a civil action with this court, and on August 27, 2004, the Honorable Thomas S.  
13 Zilly reversed and remanded the case to the Appeals Council for further proceedings. *Spytek*,  
14 C03-3193-TSZ, Dkt. No. 14. On November 29, 2004, the Appeals Council remanded the  
15 case to the ALJ, and on September 8, 2004, the ALJ again denied the plaintiff's application.  
16 Dkt. No. 9, Ex. 1. The ALJ's decision became the final decision of the Commissioner, after  
17 which plaintiff had an option to file exceptions with the Appeals Council or bring a civil claim  
18 in this Court. Dkt. No. 4 at 2; 20 C.F.R. § 404.984(a). Plaintiff chose to file exceptions with  
19 the Appeals Council, which the Appeals Council received on September 23, 2005. Dkt. No.  
20 5 at 3. Since that time, plaintiff's exceptions have been pending. On March 13, 2008,  
21 plaintiff filed a civil action in this Court, and on April 23, 2008, the Commissioner moved to  
22 dismiss this case for failure to exhaust administrative remedies.

## 23 III. DISCUSSION

### 24 A. Fed. R. Civ. P. 12(b)(1) Standard of Review

25 A court may dismiss a case for lack of subject-matter jurisdiction pursuant to Rule  
26 12(b)(1). When deciding a 12(b)(1) motion, the court must accept as true all allegations of

01 fact in the complaint and construe those facts in the light most favorable to plaintiff.  
02 *Zimmerman v. City of Oakland*, 255 F.3d 734, 737 (9th Cir. 2001). However, the court does  
03 not assume the truth of conclusory allegations and unwarranted inferences, *Halkin v.*  
04 *VeriFone*, 11 F.3d 865, 868 (9th Cir. 1993), nor must the court assume the truth of legal  
05 conclusions merely because they are cast in the form of factual allegations. *Western Mining*  
06 *Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981). A defendant may challenge jurisdiction  
07 under Rule 12(b)(1) either on the face of the pleadings or by presenting extrinsic evidence.  
08 *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000). Where jurisdiction and the merits  
09 intertwine, the court must “assume[] the truth of the allegations in a complaint . . . unless  
10 controverted by undisputed facts in the record.” *Roberts v. Corrothers*, 812 F.2d 1173, 1177  
11 (9th Cir. 1987).

12 B. Plaintiff Has Properly Exhausted His Administrative Remedies

13 The Commissioner contends that this Court lacks subject-matter jurisdiction because  
14 plaintiff has failed to exhaust his administrative remedies. Dkt. No. 4. In order to exhaust  
15 those remedies, plaintiff must obtain a “final decision” from the Commissioner. 42 U.S.C. §  
16 405(g) (authorizing judicial review only for “final decision[s] of the Commissioner of Social  
17 Security made after a hearing.”). Once the Commissioner issues a final decision, the claimant  
18 may seek review of that decision by filing a civil action in a United States District Court. *Id.*  
19 If the federal district court remands the case for further consideration, the decision of the  
20 [ALJ] on remand will become the final decision of the Commissioner, unless the Appeals  
21 Council assumes jurisdiction of the case. 20 C.F.R. § 404.984(a). In this case, plaintiff’s  
22 application was remanded by this court to the Appeals Council and in turn to the ALJ, who  
23 conducted another hearing and again found plaintiff not disabled. Dkt. No. 4 at 2. The  
24 ALJ’s decision notified plaintiff of his right either to file exceptions with the Appeals Council  
25 within thirty days or to file a new civil action in this court. Dkt. No. 9, Ex. 1. Therefore,  
26 both by statute and the ALJ’s order, the ALJ’s decision became the final decision of the

01 Commissioner.

02 Plaintiff chose to file exceptions with the Appeals Council and, for two-and-a-half  
03 years, the Appeals Council has failed to review his case. The Commissioner argues that  
04 plaintiff forfeited his right to proceed directly to federal court when he chose to file  
05 exceptions. Dkt. No. 4 at 5. He further asserts that if a plaintiff files exceptions he must wait  
06 until the Appeals Council either affirms the ALJ's decision or assumes jurisdiction and makes  
07 a new decision before plaintiff can proceed to federal court. Dkt. No. 4 at 4. To support this  
08 argument the Commissioner cites *Weinberger v. Salfi*, 422 U.S. 749, 766 (1975), which held,  
09 "[t]he term 'final decision' is not only left undefined by the Act, but its meaning is left to the  
10 [Commissioner] to flesh out by regulation," and the Code of Federal Regulations, which  
11 explains that, "[i]f no exceptions are filed and the Appeals Council does not assume  
12 jurisdiction of your case, the decision of the [ALJ] becomes the final decision of the  
13 Commissioner after remand." 20 C.F.R. § 404.984(d).

14 The Commissioner's interpretation of the statute confuses necessity with sufficiency.  
15 According to his interpretation, in order for the ALJ's decision to become the final decision  
16 of the Commissioner, the plaintiff *must not* file exceptions and the Appeals Council *must not*  
17 assume jurisdiction. However, the word "if" rather than the phrase "only if" at the beginning  
18 of the sentence indicates that if no exceptions are filed, and the Appeals Council does not  
19 assume jurisdiction, this condition is *sufficient* for the decision of the ALJ to become the final  
20 decision of the Commissioner after remand, but it is not *necessary*. The Commissioner's  
21 interpretation that this condition is *necessary* to render a final decision is inconsistent with 20  
22 C.F.R. § 404.984(a), which states that "the decision of the ALJ will become the final decision  
23 of the Commissioner *unless* the Appeals Council assumes jurisdiction of the case." *Id.*  
24 (emphasis added). In this case, the parties agree that the Appeals Council has not assumed  
25 jurisdiction. Dkt. No. 4 at 2, Dkt. No. 9 at 3, *and* Dkt. No. 5 at 3. Therefore, the ALJ's  
26 decision remains the Commissioner's final decision.

01 Furthermore, the Commissioner's argument, if followed to its logical conclusion,  
02 would authorize the Appeals Council to violate the due process rights afforded to social  
03 security claimants. Under the Commissioner's rationale, plaintiff's claim could be held in  
04 suspension indefinitely with no possibility of judicial review. Dkt. No. 9 at 1. Claims for  
05 Social Security benefits are time sensitive. Claimants rely on their benefits to afford the day-  
06 to-day cost of living, and often do not have another source of income. *Cf. Martinez v.*  
07 *Richardson*, 462 F.2d 1121, (10th Cir. 1973) ("It may be possible through the administrative  
08 route to correct this practice . . . but it would be a long and tedious process, and by the time  
09 these elderly and infirm plaintiffs followed out this remedy they might be no longer with us.");  
10 *Markva v. Haveman*, 168 F. Supp. 2d 695, 719 (E.D. Mich. 2001) ("denial or delay in  
11 benefits which effectively prevents plaintiffs from obtaining needed medical care constitutes  
12 irreparable harm."). The Court finds that prohibiting claimants from exercising their right to  
13 proceed to federal court once they have filed exceptions with the Appeals Council, and  
14 allowing the Appeals Council to sit on their claims for two-and-a-half years and more,  
15 unnecessarily delays these time-sensitive proceedings. Although, the Court eschews ruling on  
16 the constitutionality of this behavior, it is clear that such a procedure offends the most basic  
17 level of due process and can cause irreparable harm to claimants who rely on benefits for daily  
18 sustenance.

19 Finally, the Commissioner reminds the Court of the exhaustion doctrine's various  
20 purposes, including "protecting administrative agency authority and promoting judicial  
21 efficiency." Dkt. No. 4 at 5 (citing *McCarthy v. Madigan*, 503 U.S. 140, 145 (1992)). The  
22 Court finds that because plaintiff already exhausted his administrative remedies once and  
23 earned the right to proceed directly to federal court, these and other purposes of the  
24 exhaustion doctrine have been served. To this end, the Court cannot overlook the irony of the  
25 fact that the Commissioner cited "judicial efficiency" as a reason for allowing the Appeals  
26 Council to delay plaintiff's case beyond the two-and-a-half years it has had to act. Dkt. 4 at 5.

IV. CONCLUSION

For the foregoing reasons, the Court recommends that the Commissioner's motion to dismiss be DENIED, but affording the Appeals Council sixty days to rule on plaintiff's exceptions. No later than Wednesday, September 14, 2008, the Commissioner shall file its answer and the administrative record in this case, unless the Appeals Council has ruled on the exceptions. A proposed order accompanies this Report and Recommendation.

DATED this 14th day of July, 2008.

  
JAMES P. DONOHUE  
United States Magistrate Judge